

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	<b>CRIMINAL ACTION</b>
<b>vs.</b>	:	
	:	<b>NO. 03-355-2</b>
<b>ANGEL TORRES</b>	:	
	:	

**MEMORANDUM AND ORDER**

**Tucker, J.**

**November 02, 2004**

Presently before this Court is Defendant Angel Torres' Motion to Suppress evidence. For the reasons set forth below, the motion will be denied (Doc. 33).

**I. Nature and Stage of the Proceedings**

Defendant is charged with unlawfully obstructing, delaying, and affecting commerce and the movement of articles and commodities in commerce by robbery, in violation of 18 U.S.C. §§1951 and 924(c); possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §924(c)(1); **felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and aiding and abetting, in violation of 18 U.S.C. §2.**

Defendant moves pursuant to Federal Rule of Criminal Procedure 12(b)(3) and the Fifth and Fourteenth Amendments of the United States Constitution to suppress (1) all incriminating statements made by him to the police, (2) all statements made to law enforcement by co-defendant Jamie Valentin that would tend to incriminate Torres<sup>1</sup>, and (3) all physical evidence taken from Mr. Torres and Mr. Valentin.<sup>2</sup>

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<sup>1</sup> This point is moot, as the Government intends to call Mr. Valentin as a witness in the trial scheduled for November 8, 2004.

<sup>2</sup> The defendant has not specifically indicated the physical evidence sought to be suppressed. A motion to suppress evidence must set forth allegations of the relevant factual issues with definiteness, clarity and specificity. A motion which contains general conclusory factual allegations, or allegations based upon suspicion and conjecture, is not sufficient. 29 Am.Jur.2d Evidence §648. See also United States v. Migely, 596 F.2d 511, 513 (1st Cir. 1979).

This Court held hearings on the Motion. This Memorandum Opinion sets forth the findings of fact and conclusions of law regarding the instant Motion.

## **II. Legal Standard**

Rule 41(f) of the Federal Rules of Criminal Procedure provides “[a] motion to suppress evidence may be made in the court of the district of the trial as provided in Rule 12.” Fed.R.Crim.P. 41(f). Rule 12 provides that suppression motions should be made prior to trial. See Fed.R.Crim.P. 12(b)(3)(f). Ordinarily, the burden of proof in a suppression motion is on the defendant. See United States v. Lewis, 40 F.3d 1325,1333 (1<sup>st</sup> Cir. 1994). Further, a motion to suppress presents a question of law to be determined by the trial judge. See United States v. Finefrock, 668 F.2d 1168, 1171 (10<sup>th</sup> Cir.1982). The Court may resolve disputed questions of fact and may consider hearsay. See United States v. Matlock, 415 U.S. 164, 173-75 (1974).

## **III. Findings of Fact**

The relevant facts, as provided by the testimony of law enforcement officers and identification witnesses at hearings held before this Court on May 20th, August 10th, October 8th, and October 20th of 2004, are as follows:

### **A. Law Enforcement Testimony**

1. Detective Henry Glenn testified to preparing three photograph arrays for identification purposes in this case. The first photograph array had a 1993 photo of defendant. (See Government Exhibit 10, hereinafter, “G-10”). This array, G-10, was considered too old. The second photograph array consisted of Bureau of Motor Vehicles (“BMV”) photos and police photos. This array, G-12, was considered an improper match due to the difference in the photographs. The third photograph array consisted of BMV photos of eight males of the same age, race, complexion, and facial hair. This array, G-3, was used by law enforcement officers during the course of the investigation. Defendant Torres was placed in position two in the photo array.

During each identification procedure, law enforcement officers used either the original or a photocopy of the third photo array, G-3. **It should be noted that, for purposes of the suppression hearings, copies of the third array were labeled independently, however, each array is consistent.**

2. When law enforcement officers interviewed more than one witness at a given time, each individual was interviewed separately.

3. Detectives Robert Feters and Henry Glenn showed array G-3 to both Modesto and Phyllis Bonilla at their business, La Ultima Copa. Modesto Bonilla was interviewed by Glenn at one end of the bar, about 15 to 20 feet away, from Phyllis Bonilla as she was interviewed by Feters. The detectives testified that neither suggested to the witnesses who should be identified from the photo array.
4. Detective Mark McCullion interviewed witnesses Deborah Kaminsky, Joseph Ackerman, Mark Allen, Luz Colon, and Miriam Martinez on February 12, 2003. Detective McCullion used photo arrays G-14, 15, 16, 17. McCullion testified that he did not make any suggestions **about who should be identified.**
5. Special Agent Joseph Majorowitz interviewed witnesses Hector Irizarry, Benjamin Ramos, Zineb Hmidouch, and Jose Vega in June 2003. Majorowitz testified that he did not make any suggestions about who should be identified.
6. Officers Michael Musial and Michael Johncola interviewed Andrew Tagliaferro on February 5, 2003 regarding the robbery of Four Sons pizza.

## **B. Identification Witness Testimony**

1. Lahsen Lakmini testified that two males entered El Greco Pizza on January 8, 2003 at approximately **5:35pm**. The two males, one taller and the other shorter, talked to each other, while Lakmini stood two feet away. Lakmini reported that each male had a handgun and wore dark jackets with hoods that did not cover their faces. The lighting was very good and he was able to see.

On February 12, 2003 Detective **Feters** showed Lakmini two photograph arrays at different times. Lakmini purported to be 100% certain of the identification of Torres. Law enforcement did not suggest who should be identified. Lakmini identified Torres. It should be noted that on January 8 when shown photos, he was not able to make an identification. **Between January 8 and February 12, 2003, Lakmini did not see any news reports of the robbery.**

2. Zineb Hmidouch testified that she was working behind the counter at El Greco Pizza on January 8, 2003, when two Hispanic males came in and ordered two slices of pizza. The taller male placed his hands by the register, upon the register being opened, one male demanded money from the register.

On the date of the robbery, Hmidouch was taken to the police station, but no identification was made. On June 20, 2003, Hmidouch identified Torres from an eight-person photo array (G-21) by circling his photo and signing the array. Hmidouch purported to be 100% certain of the identification.

3. Jose Vega testified that he was walking from work on January 8, 2003, at approximately 5:15pm, when he witnessed two males running from El Greco Pizza. He saw, clearly, the face of the taller male.

On April 18, 2003, from a eight person photograph array (G-22), Vega identified Torres as the taller male.

4. Luz Colon testified that on January 3, 2003, two Hispanic males wearing dark sweatshirts entered Luz's Grocery and demanded **money** and threatened her family at point of gun. She testified that the taller male came to her first demanding money.

On **February 12, 2003**, Colon identified Torres from a photo array (G-17) by circling and signing the identified photo. Colon did not see any publicity about the robbery.

5. Miriam Martinez testified that on January 28, 2003, two Hispanic males entered Lefty's Saloon and ordered drinks. One male threatened Martinez with a knife and the other ordered patrons to the floor.

On February 12, 2003, Martinez identified Torres from a photograph array (G-18). Martinez indicated that the defendant came into the bar a week after the robbery to use the **cigarette** machine. She also saw a television news report after making the identification.

6. Benjamin Ramos testified that two males, one taller than the other, **entered La Ultima Copa on December 27, 2002**. One of the males ordered patrons to the floor at point of gun, however, Ramos was still able to observe their actions. Ramos was ordered to stand about two feet away from the taller male.

On the day of the robbery, Ramos provided police with a general description. He and another patron were driven around the area to locate the males. No identification was made on that date when Ramos was taken to the police station to look at photos on the computer.

On June 17, 2003, **Majorowitz** showed Ramos photo array G-20. Ramos identified the taller male, Torres, by signing and dating the photograph. At first, Ramos was not sure of the identification, but later confirmed that he was sure of the photo number two (2).

7. Hector Irizarry testified that on December 27, 2002, while at La Ultima Copa, two Puerto Rican males at point of gun demanded money from him. Irizarry was hit over the head with the gun and pretended to be dead.

On the same date, Irizarry was taken to the police station but was unable to make an identification. On June 17, 2003, Irizarry was shown a photo array (G-2) and made

uncertain identification of Torres, identifying photo numbers two (2) and seven (7) as likely.

8. Modesto Bonilla testified that on December 27, 2002, two males entered La Ultima Copa and ordered a beer. At the register, one male brandished a gun and demanded money.

Later on the same date, Bonilla was taken to the police station, no photos were shown and no identification was made. **On February 11, 2003 Bonilla** was subsequently shown photo array (G-3) and identified Torres as the male who took money from the register. Bonilla indicated that he heard about other bar robberies, but saw no news coverage.

9. Phyllis Bonilla testified that on December 27, 2002, two males entered La Ultima Copa and ordered a beer. At the register, one male brandished a gun and demanded money. One male came behind the bar and ripped her necklace from her neck.

On that same day, Bonilla was taken to the police station to make an identification, however, no identification was made. On February 11, 2003, Bonilla was shown photo array (G-3) and identified Torres. At no time did the detective suggest who should be identified. Bonilla indicated that she did not see any news reports.

10. Mark Allen testified that on January 3, 2003, two Hispanic males wearing dark hoodies entered My Place Tavern. The shorter male stood by the cigarette machine, while the other male was twenty feet away at the counter. The taller male, brandishing a gun, demanded money from the register.

On the same date, Allen was interviewed at the police station, however, there was no identification made. On February 12, 2003, police came to Allen's house with a photo array (G-16). Allen identified the taller male, Torres. Allen indicated that he did not see any posters or publicity concerning the robberies.

11. **Joseph Ackerman testified that on January 3, 2003, two males entered My Place Tavern. The taller male ordered a beer. While being given change, the male pointed a gun at Ackerman.**

**On the date of the incident, Ackerman did not make a certain identification of Torres. On February 13, 2003, Ackerman identified Torres from a photo array (G-15) by signing and dating the photo.**

12. Deborah Kaminsky testified that on December 28, 2002, two Hispanic males entered He's Not Here Café. One male ordered a beer. After ordering the beer, the male pointed the gun in her face and demanded money from the register and ordered Kaminsky to the floor.

Later that night, Kaminsky did not make an identification. On February 12, 2003, when shown photo array (G-14), Kaminsky indicated that she was 70% sure of her identification of Torres.

13. Andrew Tagliaferro testified that on February 1, 2003, he was in Four Sons Pizza shop when two males entered and demanded money while brandishing a gun. Tagliaferro testified that one male was a slender African American and the other a Hispanic Male.

On February 5, 2003, Philadelphia police contacted Tagliaferro. On that date, he and the police canvassed known hangouts in the neighborhood near 2300 Front Street. At that time, Tagliaferro erroneously identified Walter Pearson as the perpetrator of the robbery of Four Sons Pizza. Pearson was later released.

#### **IV. Conclusions of Law**

1. A pretrial identification procedure violates due process, and requires exclusion of the testimony based on that procedure, if it is “so impermissibly suggestive as to rise to a very substantial likelihood of misidentification.” The general inquiry must consider the totality of the circumstances of each case. Simmons v. United States, 390 U.S. 377, 384 (1968).
2. The Franklin court has found that a photograph line-up has not been unduly suggestive even when the backgrounds in the displayed photos were obviously different. See United States v. Franklin, 64 F. Supp. 2d 435 (E.D. Pa. 1999) (maintaining that photograph display was not unduly suggestive even though the defendant’s photograph had been taken in a hospital emergency and the background did not match the other photographs).
3. In this case, the first issue is whether the photograph arrays were unduly suggestive. This Court concludes that the photograph array was not unduly suggestive. The defendant was displayed with seven other Hispanic males of similar appearance. All of the photos were BMV photos that depicted similar lighting and positioning. Further, considering the totality of the circumstances, the majority of witnesses were able to positively identify Torres in separate interviews conducted by different law enforcement officers. Moreover, this Court questioned law enforcement officers at the suppression hearings, and we are satisfied that witnesses were not given any improper information or suggestions during the identification process.
4. This Court must further consider the reliability of the witnesses’ identification. The Supreme Court has set out the factors to be considered in making this determination: the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level

of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

5. Here, witnesses testified that they were able to view Defendant Torres during the time of the incidents. The nature of the robberies was such that the perpetrators **made direct contact with the witnesses. Witnesses testified that the male suspects entered the various establishments, sought service by ordering from the counterpersons, and then at point of gun demanded money from the register while in close proximity to the witness.** Furthermore, the perpetrators faces were not covered by the dark hoodies worn by each male. The majority of the witnesses were able to recall the height, race, and approximate age of the male suspects. Only two witnesses, Irizarry and Kaminsky, reported being less than 100% certain of their identification of Defendant Torres.<sup>3</sup> The only factor in the reliability analysis that weighs in favor of the defendant is the length of time between the crime and the Defendant's identification. While the robbery of La Ultima's Copa took place on December 27, 2002, Ramos and Irizarry identified Torres nearly six months later. Even though this may be considered a long span of time, we do not think this factor undermines the strength of the other satisfied factors. Under the totality of the circumstances, we view the identifications as reliable.
6. The Supreme Court has declined to reject the practice of pretrial photograph identification "despite the hazards of initial identification by photograph." Simmons, 390 U.S. at 384. Instead, the Court maintained that "misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." Id. In this case, two witnesses reported being less than 100% certain of their identification of Torres. However, that uncertainty does not warrant suppression of the identification, as stated, cross-examination at trial will be the best determinant of the sufficiency of pretrial identification. This Court concludes that the factual surroundings of this case indicate that the identification procedure used by law enforcement was reliable and not unduly suggestive. Therefore, Defendant Torres has not been denied due process of law.
7. This Court must also consider whether identification witnesses were impermissibly exposed to extensive pretrial publicity. The Third Circuit has examined this issue in the Zeiler line of cases. In Zeiler III, 470 F.2d 717 (3d Cir. 1972), the Court of Appeals held that witness identifications were not doubtful or suspicious due to extensive pretrial publicity.

In Zeiler, four robbery witnesses testified, at the suppression hearing, that they saw pictures of the defendant's arrest on television and in the newspaper prior to viewing the defendant in a photograph display. In that case, the court reasoned that the constitutional

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<sup>3</sup> The aberrant testimony of Andrew Tagliaferro is noted by this Court.

guarantees protect the defendant from an impartial jury, but not an impartial witness. Specifically, the court stated, “we long ago abandoned the practice of disqualifying witnesses because of presumed bias. Bias can be examined through cross-examination, and juries are free to disregard biased testimony. The same standards cannot be applied to both jurors and witnesses vis-a-vis pretrial publicity.” Id. at 720.

8. This Court concludes that the identification witnesses were not impermissibly exposed to pretrial publicity. Here, in comparison to Zeiler, identification witnesses did not have extensive exposure to pretrial publicity. Only one witness, Martinez, testified to seeing news coverage and reading a newspaper article before identifying the Defendant. Moreover, the newspaper article featured a photo of Jaime Valentin, the Defendant’s former co-defendant in this case, not a photo of the Defendant himself.
9. For the foregoing reasons, this Court concludes that Defendant Torres was not denied due process of law.

### **ORDER**

And now this 2<sup>nd</sup> day of November 2004, it is **HEREBY ORDERED AND DECREED** that the Defendant’s Motion to Suppress is **DENIED**.

BY THE COURT:

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Honorable Petrese B. Tucker, U.S.D.J.